



# PUBLIC WORKS DEPARTMENT

CITY OF PORTSMOUTH

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VIA ELECTRONIC AND FIRST CLASS MAIL

November 2, 2015

Newton Tedder  
US EPA—Region 1  
5 Post Office Square—Suite 100  
Mail Code OEP06-4  
Boston, MA 02109-3912

**RE: Comments to the US Environmental Protection Agency Proposed Language  
Changes for the NH Small MS4 General Permit Published on September 1, 2015  
from the City of Portsmouth New Hampshire**

Dear Mr. Tedder:

The City of Portsmouth provides the following comments on the Environmental Protection Agency's ("EPA") Notice of a Re-Opening of the Public Comment Period on Select Sections of the Draft Small Municipal Separate Storm Sewer System (MS4) NPDES General Permit - New Hampshire (hereafter "NH MS4 Permit") published for public comment in the Federal Register on September 1, 2015, and found at <http://www.epa.gov/region1/npdes/stormwater/MS4 2013 NH.html>.

## **Introduction**

The City of Portsmouth, New Hampshire with a population of approximately 21,000, consists of approximately 17 square miles and is located on the Piscataqua River. Portsmouth's City storm drain infrastructure consists of approximately 323,000 lineal feet of pipe, 4,700 catch basins or manhole structures and 450 outfalls. This proposed General Permit would be applicable to the City's Separated Storm Sewer system, and as such, the City is providing the following comments.

## **Incorporation of Other Comments**

Portsmouth has previously submitted comments on the original draft of the NH MS4 Permit, see Comments dated August 15, 2013. Portsmouth incorporates those original comments by reference. Portsmouth has also participated with a coalition of other communities in developing comments, those comments are being submitted this date by the law firm of Sheehan, Phinney, Bass and Green and are appended to this document as attachment A.

## **Comments**

Portsmouth objects to the issuance of the NH MS4 Permit as currently proposed. The City objects to improper and illegal assumptions as to non-point discharge impacts. Portsmouth is committed to water quality, but municipal efforts must be based on sound, up-to-date science so that major decisions regarding the City's infrastructure and operational investments will deliver demonstrable water quality results. In the absence of significant (if any) federal and state funding for stormwater management and infrastructure improvements, EPA must have a heightened sensitivity to the importance of getting regulatory changes right when local resources are already strained. The City seeks meaningful improvements and local flexibility to solve water quality issues. The City appreciates that some of the proposed changes to these amended sections seem to reflect EPA willingness to address local concerns to the earlier draft and that effort is acknowledged; however, issues remain, and they are noted below in both general and specific comments.

### **General Comments:**

1. Portsmouth objects to any requirements being imposed on it under this MS4 permit for nitrogen removal. Portsmouth emphasizes the importance of using the most currently available water quality data to establish permit requirements. Or alternatively, there must be some means of modifying the permittee's obligations when the State agency updates its water quality findings during the permit period rather than freezing in time the permittee's obligations. Currently EPA has linked the MS4 permit to the current approved 2012 303(d) list for the entire length of the proposed permit, which could be a decade or more given past EPA practice. That approved 303(d) list shows Portsmouth discharging into waterbodies impaired by nitrogen, a conclusion that Portsmouth long has questioned. The proposed 2014 303(d) list by contrast shows no nitrogen impairments in the waterbodies to which Portsmouth discharges.
2. Portsmouth objects to the agency's use of the phrase "certain water quality limited waters" such as found in section 2.2.2. The phrase is undefined in the regulations and is too open-ended. It creates a risk that a permittee such as Portsmouth may be required to implement additional controls in the middle of the permit cycle without proper scientific and local agency review and without the requisite process required for such mid-permit modifications. In addition, Portsmouth notes that while this agency's attempt to add, mid-permit, additional obligations based on new data, there appears to be no corresponding method to relieve the municipalities from unnecessary controls when waterbodies are delisted, determined no longer to be impaired, or determined to have improved during the term of the permit.
- Portsmouth requests that the agency clarify the regulation of "tributaries" which is referred to in several sections including Sec. 2.1.1b and c. Portsmouth finds the attempt to regulate tributaries vague and suggests potential future limitations that must be subject to proper notice and comment. The City cites as an example Pickering Brook which is impaired for nitrogen in Greenland in the 2010 and 2012 303(d) listings, but not in the proposed 2014 303(d) list. Pickering Brook in Portsmouth isn't listed for nitrogen in any

of the 303(d) lists 2010, 2012, or the proposed 2014. Pickering Brook has its source in the Great Bog in Portsmouth but is tributary to the Greenland section. If Pickering Brook is determined to be impaired for Nitrogen, it seems that Portsmouth could potentially be required to adhere to the nitrogen requirements in the Greenland section is identified as impaired.

### **Comments to Specific Sections**

Section 2.1.1. Portsmouth objects to this section to the extent that it implies that any contribution of a pollutant from a stormwater pipe to a water body not meeting water quality standards would constitute a violation. The permit language does not appear to consider or define a de minimis concentration such that, for example, a low concentration of a pollutant exiting a stormwater pipe that intermittently discharges to an impaired waterbody could be considered to contribute to the exceedance. An assessment should be required of the discharges impact before any necessary controls are mandated to be taken by the municipality.

Sec 2.1.1.b and c. See General Comment 3 above.

Sec. 2.1.1.c See General Comment 2 above.

Sec. 2.2.1.e This section references Appendix F Table F-1 which lists the bacteria impaired waterbodies by community. The waterbodies listed appear to be from the 2010 approved 303(d) listing. EPA has recently approved the 2012 list and NHDES has issued a draft of the 2014 303(d) list which is based on the most currently available information. The list in Table F-1 in Appendix F should reflect the latest information available for bacteria.

Section 2.2.2 a (i) (1) Portsmouth specifically objects to being identified as a community discharging to a waterbody impaired by nitrogen. See General Comment 1.

Section 2.2.2 (a) (1) In the event that the nitrogen controls set forth in Appendix H remain applicable to Portsmouth, Portsmouth seeks confirmation that the public education and outreach requirements, ordinance changes, good housekeeping, pollution prevention requirements, and the nitrogen removal tracking obligations found in Appendix H at Section I (1) apply only for the catchments within the impairment areas. As currently proposed, these requirements now appear to apply to the entire urbanized area.

Sec. 2.2.2 References Appendix H. Appendix H Part 1 references "Water Quality Response Plans" which are no longer proposed in the permit and the language should be deleted from Appendix H and all other places in the permit. Perhaps the Stormwater Management Plan would serve as an appropriate substitute.

Section 2.2.2 d – This section regulates municipalities such as Portsmouth that discharge into chloride impaired waters. With regard to the controls and requirements set forth in Appendix H the City provides the following:

Appendix H, IV, Section 4 (b) seeks to impose upon municipalities certain obligations relative to the application of salt on private parking lots and owners of private streets. New Hampshire is not a home rule state and consequently any authority the City has to mandate, regulate, and enforce such actions against private property owners must be found or derived from authorizing state legislation or law. While the City may be able to sustain an argument that there is authority for it to require private parking lot owners to use only trained and certified salt applicators due to possible runoff into City stormwater systems, the reporting requirement to UNH seems particularly hard to justify as being within the City's authority without state enabling legislation. Moreover, the enforcement logistics and difficulty of the requirement could be significant. It is difficult to enforce ongoing maintenance requirements of any systems when the ownership of property changes. Requiring the installation of a swale or detention pond as part of site review approval and holding a bond to secure such performance is routine and relatively easy. What this regulations calls for in terms of the oversight of private property owners across time and owners should be done at the State of New Hampshire level. The MS4 permit is the wrong vehicle for regulating the conduct of private property owners in the State of New Hampshire.

Section 2.3.6.a.ii (b) Portsmouth is concerned with regard to the ambiguous requirements for salt/snow storage areas on new/re-development sites. By way of example, it requires "no untreated discharge" and fails to define "treatment of stormwater."

#### **Additional Comments**

Appendix F: In Table F-1, please note that Assessment Unit NHRIV600031001-10 is named Newfields Ditch, not Newfileds Ditch.

Appendix H.V (impairments without TMDLs for hydrocarbons, metals and solids): It is not clear what waters are impaired for solids. Review of the 2012 final and 2014 draft 303(d) lists shows no waters in New Hampshire are impaired for "solids." Please clarify what is meant by "solids" and which waters in New Hampshire are impaired for this parameter, or delete this parameter from section H.V.

Thank you for the opportunity to provide comments to this proposed permit for stormwater discharges from small municipal separate storm sewer systems.

Sincerely,



Brian F. Goetz  
Deputy Director of Public Works

Cc: John P. Bohenko, City Manager  
Peter H. Rice, P.E., Director of Public Works  
Suzanne Woodland, Deputy City Attorney  
Terry Desmarais, City Engineer